ORIX CREDIT MALAYSIA SDN BHD A

v.

CITY MOTORS

HIGH COURT SABAH & SARAWAK, KUCHING B
ABDUL AZIZ ABDUL RAHIM J
[CIVIL APPEAL NO: 11-05-2007-II]
9 NOVEMBER 2007

CONTRACT: *Agreement - Repurchase/recourse agreement - Standing master agreement between dealer and finance company undertook hire purchase transaction where dealer guaranteed hirer's obligation - Whether 'guarantor' under recourse agreement could seek protection under Hire Purchase Act 1967 - Whether Hire Purchase Act 1967 applicable to a repurchase agreement* C D

LIMITATION: *Cause of action - Claim for loss based on breach of hire purchase agreement - Whether item 94 of the Sarawak Limitation Ordinance applicable - Period calculated from date of disposal of vehicle - Whether plaintiff within time - Whether claim against defendants time barred* E

Two questions of law were put to the learned trial magistrate for ruling which were (a) whether the Hire Purchase Act 1967 ('the Act') applied to the repurchase agreement dated 29 July 1989 as far as the third defendant/respondent was concerned and (b) whether (i) item 20 or 94 of the Sarawak Limitation Ordinance (Cap 49) applied to the action against the first and second defendants. The learned magistrate had answered the first question in the affirmative and found no necessity to consider the matter raised in the second question. Dissatisfied, the plaintiff appealed. The plaintiff ('appellant') was trying to recover from the defendant the losses it had suffered from the hire purchase agreement entered into between the plaintiff and the first and second defendants from the dealer (defendant/respondent) under a master agreement or the recourse agreement. The plaintiff argued that the Hire Purchase Act was silent on the rights and protection to be given to a recourse dealer and that in the Court of Appeal case, *Hong Leong Finance Bhd v. Thamilchelevan Palinesamy & Anor*, it was found that the guarantee given by the recourse dealer did not come within the expression 'contract of guarantee' as defined by the Act. However, it was submitted by the defendant that the recourse agreement was still dependent on the Act. F G H I

Held (allowing the appeal):

(1) In the definition to the expression 'contract of guarantee' under s. 2(1) of the Act, it states that 'expression guarantor shall be construed accordingly.' When one speaks of a 'guarantor' under the recourse agreement, it does not refer to the 'guarantor' under a hire purchase agreement who guaranteed the performance under the agreement at the request of the hirer. Thus, the 'guarantor' under the recourse agreement could not seek protection under the Act under the provisions applicable to the guarantor of the hirer under the hire purchase agreement, simply because the recourse agreement was outside the purview of the Act. The recourse agreement was not a contract of guarantee entered into between the dealer and the finance company at the request of the hirer under the hire purchase agreement. As a matter of fact and law such guarantee falls outside the Act. The Act does not apply to a recourse agreement. (para 21)

(2) The plaintiff's claim was a claim for loss based on a breach of the hire purchase agreement which, without any dispute, was in writing. Therefore, item 94 was applicable. The plaintiff's action against the first and second defendants was not time barred if the period calculated was from the date of the disposal of the vehicle which was 20 April 1999. Since the action was filed on 23 April 2003, the plaintiff was still within time. The six-year period only expired on 19 April 2005. (paras 38 & 40)

Case(s) referred to:

Hong Leong Finance Bhd v. Thamilchelevan Palinesamy & Anor [2002] 2 CLJ 281 CA ***(refd)***

Daly v. Roth [1956] 73 WN (NSW) 270 ***(refd)***

Goulston Discount Co, Ltd v. Clark [1967] 1 All ER 61 ***(refd)***

Kong Ming Bank Bhd v. Sim Siok Eng [1982] 1 LNS 12 PC ***(refd)***

Unity Finance Ltd v. Woodcock [1963] 2 All ER 270 ***(refd)***

Legislation referred to:

Hire Purchase Act 1967, ss. 2(1), 22

Hire Purchase Act 1938 [UK], s. 11(1)

Other source(s) referred to:

AG Guest, *The Law of Hire Purchase,* pp 390-394

R.M Goode, *Hire Purchase Law And Practice,* 2nd edn, pp 652-657

For the plaintiff/appellant - Tan Kee Heng; M/s SK Ling & Co
For the defendant/respondent - Jie Nyuk Choo; M/s Jie Nyuk Choo & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Aziz Abdul Rahim J:

[1] Two questions of law were put to the learned trial magistrate for ruling. The questions are:

(a) whether the Hire Purchase Act 1967 applies to the repurchase agreement dated 29 July 1989 as far as the 3rd defendant/ respondent is concerned.

(b) if the Hire Purchase Act 1967 does not apply, whether (i) item 20 or 94 of the Sarawak Limitation Ordinance (Cap 49) applies to the action against the 1st and 2nd defendants; (2) if the action against the 1st and 2nd defendants is statute barred by virtue of item 20 of the Limitation Ordinance (Cap 49) whether the 3rd defendant/respondent is liable to pay a debt which has been statute barred against the 1st and 2nd defendants.

[2] The plaintiff in the court below (and the appellant in this appeal) conceded that if the Hire Purchase Act 1967 ("the Act") applies to the repurchase agreement dated 29 July 1989 then the repurchase agreement is null and void by virtue of s. 22 of the Act. The defendant(s) in the court below (and the respondent(s) in this appeal) also conceded that if the action against 1st and 2nd defendants is not statute barred under the Limitation Ordinance (Cap 49), the plaintiff may enter judgment against the defendant for the amount claimed in the plaintiff's statement of claim.

[3] On 23 May 2007 the learned magistrate answered the 1st question in the affirmative. That being so there is no necessity to consider the matters raised in the second question because by prior agreement and concession between the parties, the repurchase agreement is null and void in the wake of the learned magistrate affirmative decision on the first question posed to him.

[4] The plaintiff was not satisfied with the learned magistrate's decision; hence this appeal to the judge.

[5] Both parties tendered written submissions.

[6] The plaintiff's contention is that the Act does not apply to a repurchase agreement or recourse agreement. Referring to *"The Law of Hire Purchase"* by A.G. Guest, at pp. 390-394 learned counsel for the plaintiff submits the repurchase agreement or a recourse agreement is a standing master agreement between a dealer and a finance company that undertake the hire purchase transaction under which agreement the dealer guaranteed the hirer's obligation under the hire purchase agreement and would indemnify the loss caused to the finance company under the hire purchase agreement. However the recourse agreement is different from the agreement of guarantee or indemnity by a guarantor under the hire purchase agreement in that the latter is made at the request (express or implied) of the hirer whereas the former is not.

[7] In *"Hire Purchase Law And Practice"* by R.M Goode 2nd edn. at pp. 652 to 657, it is stated that "[T]he expression 'recourse' is a general term indicating the right of a finance company to look to the dealer for loss suffered on transactions put through by him. The dealer's obligation may be either a general one imposed by the master agreement and affecting all transactions he may conclude with the company …"

[8] Thus in this case the plaintiff is trying to recover from the defendant the losses it has suffered from the hire purchase agreement entered into between the plaintiff and the 1st and 2nd defendants from the dealer (the defendant/respondent) under the master agreement or the recourse agreement.

[9] Learned counsel for the plaintiff advanced two arguments saying that the Act does not apply to repurchase or recourse agreement.

[10] The first argument is that the words provided in the relevant clauses of the said recourse agreement such as "… the legislation from time to time in force relating to hire-purchase agreements" are clearly referring to the Act which is applicable to hire purchase agreement. The rights and protection of the hirer and the

guarantor under a hire purchase agreement are provided under the Act. But the Act is simply silent on the rights and protection to be given to a recourse dealer.

[11] The second argument, and this is the most persuasive one, is that the Court of Appeal in *Hong Leong Finance Bhd v. Thamilchelevan Palinesamy & Anor* [2002] 2 CLJ 281 has ruled that the "recourse dealers' who "though acting as a guarantor to a hirer under a hire purchase agreement within the Hire Purchase Act does not enjoy the protection accorded by the Hire Purchase Act to 'guarantors' falling within the meaning of the Hire Purchase Act". It was submitted that in that case, the learned Gopal Sri Ram JCA clearly held that the guarantee given by recourse dealer did not come within the expression 'contract of guarantee' as defined by the Act. In fact His Lordship, referring to the case of *Daly v. Roth* [1956] 73 WN (NSW) 270, cited by the plaintiff's counsel in his arguments in that case went on to say that "a dealer's guarantee, though falling outside the purview of the Act may be enforced at common law".

[12] The learned defendant's counsel whilst conceding that the recourse agreement falls outside the definition of a 'contract of guarantee' under s. 2(1) of the Act, submits that she is not relying on the section to say that the recourse agreement is invalid. She says that the case of *Hong Leong Finance Bhd, supra,* relied on by the plaintiff, is distinguishable from the instant case. She argues that whilst it is true that the repurchase or recourse agreement is based on a contract between the parties, nevertheless it does not mean that only one Act of Parliament is applicable to it. She argued so because she said that a contract like this involves many aspects of the law and as such it can involve a number of Acts of Parliament. She further said that even the Bankruptcy laws are mentioned in cl. 6(c) of the repurchase agreement. Also, she argues that pursuant to cl. 12 of the repurchase agreement, the term therein specifies that "[T]hat any Agreement arising herefrom shall be governed by law of Malaysia". As such, she submits, by the context alone, it is to be understood that whichever laws of Malaysia can be applicable *per se* in so far as they are relevant.

[13] I must confess that I do not quite follow the submissions by the learned counsel mentioned in the last paragraph on the point of 'applicable laws' in relation to the recourse agreement or repurchase agreement. The way I understood the submissions is that the recourse agreement should not be governed just by one

law of Malaysia or an Act of Parliament (in this context most probably the learned counsel is referring to the Contracts Act 1950) but by whichever laws of Malaysia that are relevant to the agreement. I am of that view because immediately following the above submissions the learned counsel for the defendant wrote in his written submissions (at p. 4 of the written submissions) as follows:

> The situation here however varies from situation in the British law. This is because our Malaysian Contracts Act 1950 is based on the Indian Contracts Act 1872. Thus the common law of Britain is no longer applicable to any situations here unless there is a lacuna in the law ie, there is no 'other provision' in the written law.

[14] This reading of the submissions by the learned counsel for the defendant seems to be correct in the light of the plaintiff's argument that the recourse agreement is outside the ambit of the Act and can be enforced under common law. Also in the next breath of her submissions learned counsel for the defendant is contending that "though the recourse agreement is not strictly borned out of the Hire Purchase Act, yet the repercussions in connection with the Hire Purchase Act are far reaching and applicable in so far as the appellant's action is concerned. The recourse agreement is a valid agreement but whether the appellant can use it in this action is thus dependant on the terms and conditions in the hire purchase agreement affecting the 1st defendant,...." (see last para. on p.5 of respondent's counsel written submissions).

[15] Thus on the foregoing reasons, it is safe to assume, in my view, that when learned counsel for defendant referred to 'one Act of Parliament' in her written submissions she was indeed referring to the Contracts Act 1950; and when she referred to 'whichever laws of Malaysia that are relevant' she must have had in her mind the Act. Such assumption I think would be in line with the rest of the learned counsel written submissions where she argued on the relevance and the applicability of the Act to the recourse agreement.

[16] On this note, it is the submissions by learned counsel for the defendant that the recourse agreement is still dependant on the Act. This, she said, is because of the hirer's obligations which fall strictly under the Act. She argues that 'in a sense, if the hirer's obligations under the Hire Purchase Act have been compromised

or have been affected detrimentally through no fault of the hirer, his obligations may even be terminated eg, where in the course of repossession, the vehicle in question is stolen or destroyed or where the finance company had failed to control its hold over the registration card and allowed it to be taken by third parties under the pretext of renewing the vehicle's road tax and then never giving it back.' She further submits that there are many instances where the finance company had been negligent and had failed to protect the goods under hire purchase. In the case of illegality, she said, even though the dealer had duly indemnified the finance company for the loss, the finance company cannot rely on such indemnity when it is in breach of the Act.

[17] Having said that I now return to the main issue in this appeal that is whether the Act applies to a recourse or repurchase agreement. When the parties asked me to decide whether the Act 'applies' my thinking is that what does it means by the expression 'applies'? In my answer to this question, I think it must relate to the rights and obligations of the parties under the recourse agreement. In other words, how does the Act regulate those rights and obligations and what are those rights and obligations under the Act.

[18] In this regard, s. 2(1) of the Act excludes from the definition of a 'contract of guarantee' a contract made between the dealer or person engaged at the time of giving of the guarantee in the trade or business of selling goods of the same nature or description as the goods comprised in the agreement and the hirer. That section also provides that the expression 'guarantor' shall construe accordingly. This situation was confirmed by the Court of Appeal in its decision in *Hong Leong Finance Bhd, supra.*

[19] The *Hong Leong Finance Bhd, supra,* was an appeal on a point of law from the decision of a High Court which had earlier dismissed the plaintiff's appeal against the 2nd defendant in that case on the ground that the contract of guarantee was void because it contravened the Act. In the Court of Appeal's decision, the court, whilst agreed entirely with the High Court's conclusion that the guarantee in that case does not come within the expression 'contract of guarantee' as defined by the Act, disagree that it follows from that premise that a guarantee given by a dealer is automatically and without more, void and unenforceable. The court says, at p. 284 & 285:

> In other words, it does not follow that because the present guarantee falls outside the statutory definition, it is void and unenforceable. I find no provision – there is indeed none – in the Act that so declares. And it is now settled by high authority that a court is not entitled to strike down a contract or other transaction as being prohibited by statute unless that is the inevitable conclusion to be arrived at upon a proper construction of the statute in question.

[20] It is pertinent to note that the Court of Appeal in its decision did not decide on the issue whether or not the Act applies to a recourse agreement. This is still an open question. The Court of Appeal in my understanding of the decision decided only on the nullity and voidability and hence the enforceability of the recourse agreement or the guarantee given by the dealer which falls outside the definition of 'contract of guarantee' under s. 2(1) of the Act.

[21] In my view, having regard to the Court of Appeal's decision and that as a matter of fact and law such guarantee falls outside the Act, the Act does not apply to recourse agreement. The 'guarantor' referred to in the Act in my view refers to a 'guarantor' who has executed a guarantee at the request of the hirer under the Act to guarantee the performance of the hirer under the hire purchase agreement. I say so because in the definition to the expression 'contract of guarantee' under s. 2(1) of the Act, it states that "expression 'guarantor' shall be construed accordingly". This means, in my opinion, that when one speaks of a 'guarantor' under the recourse agreement, it does not refer to the 'guarantor' under a hire purchase agreement who guaranteed the performance under the agreement at the request of the hirer. Thus the 'guarantor' under the recourse agreement cannot seek protection under the Act under the provisions applicable to the guarantor of the hirer under the hire purchase agreement, simply because the recourse agreement is outside the purview of the Act. The recourse agreement is not a contract of guarantee entered into between the dealer and the finance company at the request of the hirer under the hire purchase agreement.

[22] Learned counsel for the defendant cites the case of *Unity Finance Ltd v. Woodcock* [1963] 2 All ER 270, a Court of Appeal's decision from England. In that case the court had disallowed the finance company from recovering any sum from the dealer under the recourse agreement because the finance company breached

s. 11(1) of the English Hire Purchase Act 1938 in their re-possession of the car under the hire purchase agreement whereby the finance company is prohibited to take possession of the car under hire purchase except by action at law if the hirer had paid more than one-third of the hire purchase price, which was the case in that case. The court in that case ruled that because of this illegal act by the finance company, it put an end to the dealer's liability as guarantor under the recourse agreement and also because the finance company had failed to notify the dealer promptly of their termination of the hire purchase agreement with the hirer. In that case also the court held that the recourse agreement is agreement of guarantee.

[23] In my view the decision in *Unity Finance Ltd, supra,* does not support the defendant's contention in this instant case that the Act applies to the recourse agreement. Though in that case the court held that the finance company could not recover from the dealer under the recourse agreement because of the latter's breached of a statutory provision in the Hire Purchase Act, the breach is only in relation to the hire purchase agreement between the hirer and the finance company. To do something outside the provision of a statute is illegal. This was what the finance company did in that case. At common law a party cannot benefit under a contract from its own illegal act. So the refusal of the Court of Appeal to allow the finance company to recover from the dealer in the *Unity Finance Ltd, supra,* not dependant on the applicability of the provisions of the English Hire Purchase Act 1938 to the recourse agreement in that case. It is simply based on the principle of illegality under contract law.

[24] Surprisingly in a later case *Goulston Discount Co., Ltd v. Clark* [1967] 1 All ER 61, the English Court of Appeal, on the same issue whether the finance company can recover from the dealer under the recourse agreement, allowed the finance company to recover from the dealer. It is to be noted that two of the law lords in *Goulston Discount Co. Ltd, supra,* that is Lord Denning and Lord Danckwerts also sat on the panel that decided the appeal in *Unity Finance Ltd, supra.* In *Goulston Discount Co. Ltd, supra,* Lord Denning distinguished *Unity Finance Ltd, supra,* in the following way:

> The only difficulty is the decision of this court in *Unity Finance, Ltd v. Woodcock*. The judge felt that on that case he was bound to hold that this agreement here was a guarantee. I can well understand the judge taking that view, seeing what was said in that case; but on reading the case again, I think that decision should be based on illegality. The finance company there had acted quite illegally. They had repossessed the car in breach of the statute when more than one third had been paid. On so doing the hire purchase agreement came to an end altogether. There was no hire purchase price and no sums payable under the agreement. Yet by the action they were seeking to be paid the full amount from the consequences of their own illegal act. That they could not be allowed to do. That is the ground on which the decision should rest. The case should not be taken as establishing that all these recourse agreements are contracts of guarantee and not indemnity. Quite the contrary. A simple specific recourse agreement, such as that before us here, is clearly a contract of indemnity and not a guarantee. [at p.63 paragraphs G - I]

[25] It is also obvious from the reading of the above quoted passage that the English Court of Appeal is of the view that generally a recourse agreement is a contract of indemnity, though in some cases, depending on the construction of the contract document, it could also be a contract of guarantee.

[26] For the above reasons I hold that the answer to the first question posed to the learned trial magistrate must be answered in the negative.

[27] Having come to the above conclusion as to applicability of the Act to the recourse agreement I now have to decide on the issue of limitation raised in the second question posed to the learned trial magistrate.

[28] On this issue the defendant's contention is that the action against 1st and 2nd defendants is time barred because Item 20 of Part III of the Schedule to the Sarawak Limitation Ordinance applies and not Item 94 as contended by the plaintiff.

[29] Item 20 states that the limitation period for the 'hire of animals, vehicles, boats or household furniture' is three years from when the hire becomes payable.

[30] Item 94 states that the limitation period for "compensation for breach of a contract in writing" is six years and the period begins to run from "when the period of limitation would begin to run against a suit brought on a similar contract not in writing". In

this regard it is necessary to refer to Item 93 of the Schedule to the Ordinance which provides for the limitation period for compensation for the breach of any contract, express or implied, which is not in writing. The limitation period under this Item 93 begins to run from the date when the contract is broken or where there are successive breaches, when the breach in respect of which the suit is instituted occurs, or where the breach is continuing, when it ceases.

[31] In this instant case there is no claim of the breach being a continuing breach. Therefore, based on Item 93 the limitation period under Item 94 of the Schedule to the Ordinance begins to run from the date the breach occurs.

[32] Learned counsel for the defendant contends that Item 20 has to apply. She argues that Item 20 refers to the 'hire' of 'vehicles'; and it is also very clear, she said, that the action the plaintiff took against the 1st and 2nd defendants is based solely on the Act. She further said that the plaintiff referred to the Act in paras. 5(d), 10 and 11 of its statement of claim. Also, she argues, the action is not based on a claim for compensation for breach of a contract in writing; but is based on a shortfall amount in the sum of RM18,176.15 and accrued interest. There is nothing, she submits, in the statement of claim that refers to a "compensation for breach of a contract".

[33] Learned counsel for the defendant argues that applying Item 20 the appellant's action is statute barred. The repossessed vehicle was sold off only on 20 April 1999, a fact which is not in dispute. That was the date when the shortfall becomes due. But the plaintiff only commenced the action on 23 April 2003 which is outside the three years period provided under Item 20. She also argues that the date the plaintiff issued a letter of demand should not be taken as the date the limitation period started to run. This is because, she argues, the plaintiff could delay in issuing the letter of demand.

[34] Counsel for the plaintiff on the other hand argues that Item 94 is applicable instead of Item 20. He argues that Item 20 particularly cater for 'hire' of animals, vehicles, boats or household furniture; whereas Item 94 caters for 'compensation' for breach of a contract in writing. He further argues that the expressions 'hire' and 'hire purchase' must be distinguished and that the two types of transactions are substantially different. To substantiate his

A argument, learned counsel for the plaintiff referred to the meaning given to the two expressions in *Dictionary of Law* published by Oxford University Press 5th edn. In that publication, the expression 'hire' means "a contract for the temporary use of another's goods, or the temporary provision of his service or
B labour, in return for payment." In contrast, the expression 'hire purchase' is given the meaning as "a method of buying goods in which the purchaser takes possession of them as soon as he has paid an initial instalment of the price (a deposit) and obtains ownership of the goods when he has paid all the agreed number
C of subsequent instalments and exercise his option to purchase the goods".' Learned counsel for the plaintiff also referred to *The Law Lexicon* on the meaning of the two expressions, and which meanings do not differ fundamentally from the meaning given to the two expressions by the *Dictionary of Law*. On that distinction,
D learned counsel for the plaintiff submits that Item 20 cannot be taken to refer to hire purchase transaction just because the expression 'hire' is used in the Item. Moreover, counsel for the plaintiff submits that Item 94 makes reference to a contract in writing; and it is not disputed that the hire purchase agreement
E dated 31 July 1997 entered between plaintiff and the 1st defendant as the hirer (exh. L3 in the applicant's notice of application dated 5 August 2005) and the guarantee, also dated 31 July 1997 (exh. L5 in the appellant's notice of application of the same date), executed by the 2nd defendant are undoubtedly
F contracts in writing.

[35] I accept the above submissions that the expression 'hire' and 'hire purchase' must be distinguished. So distinguished, and given its ordinary meaning and common usage, it is plain that hire
G purchase transaction falls outside the scope of Item 20.

[36] As to the defendant's argument that Item 94 is inapplicable because the plaintiff's action is not for compensation, learned counsel for the plaintiff submits that 'compensation' is a general
H term to describe a payment which a party is entitled to claim from the other party for loss or damage arising from the breach of a contract. He further submits that perusal of the plaintiff's statement of claim obviously shows the plaintiff was suing the 1st defendant as hirer for loss and damage suffered as a result of the
I 1st defendant's breach of the said hire purchase agreement.

[37] On the authority of *Kong Ming Bank Berhad v. Sim Siok Eng* [1982] 1 LNS 12, PC; [1982] 2 MLJ 205 I think there is much substance in the plaintiff's counsel submissions. In that case the Privy Council said as follows:

> There remains only the question whether the suit in this case can properly be described as one "for compensation for the breach of a contract". The claim was formulated in the statement of claim as a claim for money lent. But it cannot be doubted that a failure to repay a present and enforceable debt, whether the liability arises on the loan being made (which, subject to the extension of section 20 of the Ordinance, is the respondent's case) or only on demand (which is the appellant's case), is a breach of contract. Whichever be the true view as to the date of the breach of contract, the appellant's suit is, in their Lordships' view, a claim based on breach of contract.
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> But is the claim properly described as one for compensation for breach of contract? The Indian origin of the Ordinance now assumes importance. In *Vythilinga Pillai v. Thetchanamurti Pillai* [1880] ILR 3 Mad 76 the High Court of Madras held that a suit to recover arrears of rent was a claim for breach of contract. The Court noted that compensation was a general term used in the Indian Contract Act [on which our Contracts Act 1950 is based] to denote a payment which a party is entitled to claim on account of loss or damage arising from breach of contract. In *Tricomdas Cooverji Bhoja v. Gopinath Jiu Thakur* [1916] 44 1A 65 the Judicial Committee of the Privy Counsel took the same view. Lord Sumner, who delivered the judgment of the Board commented (at page 70) that an interpretation so often and so long put upon the statute by courts in India should not now be disturbed.
>
> Their Lordships respectfully agree. The claim in this suit may properly be described as one for compensation for breach of contract. The contract being in writing, the period of limitation is 6 years. (The words in square bracket are mine for emphasis).

[38] Likewise in this instant case the plaintiff's claim is a claim for loss based on a breach of the hire purchase agreement which, without any dispute, is in writing. Therefore applying the above reasoning I hold that in this case Item 94 applies. In any case, the arguments by learned counsel for the plaintiff that Item 94 applies would have prevailed for the reason that this court is bound by the decision in the Privy Council case of *Kong Ming Bank Berhad, supra*, which have ruled that if a case falls within a specific article where there is no room for the application of a general article, the application of art. 94 is not excluded.

[39] However the question now is whether the plaintiff is out of time? In this case it is not disputed that the vehicle under the hire purchase agreement was repossessed by the plaintiff and was subsequently sold off on 20 April 1999. The plaintiff contends that this is the date of the termination of the hire purchase agreement with the 1st defendant; the disposal of the vehicle on 20 April 1999 signifies the acceptance of the repudiation of the agreement by the 1st defendant. Subsequently on 26 October 2002 the appellant issued letter of demand addressed to the 1st and 2nd defendants. The summons and the statement of claim in this case was issued on 23 April 2003.

[40] On the above facts, and in view of my holding that Item 94 applies, clearly the plaintiff's action against the 1st and 2nd defendants is not time barred if the period is calculated from the date of the disposal of the vehicle which is 20 April 1999. This is because under Item 94 the limitation period is six years. Since the action was filed on 23 April 2003, the plaintiff is still within time. The six years period only expires on 19 April 2005.

[41] The date of the disposal of the vehicle should be preferred in computing the period within which the plaintiff must file the action against the 1st and 2nd defendants over the date of the letter of demand which is on 26 October 2002. This is so because the plaintiff's claim is for loss or compensation for the breach of the hire purchase agreement resulting in the shortfall after the disposal of the vehicle. By the time the vehicle was deposed the plaintiff would have known the amount of the short fall and therefore would be able to compute the loss. At that point of time the plaintiff would be able to make a claim against the hirer and the guarantor to make up for the short fall. The plaintiff must not sit on its right; instead must diligently pursue his claim against the hirer and the guarantor in this case. Thus the argument by the defendant that if the date of the letter of demand is to be used in computing the limitation period, the advantage will be to the plaintiff as the plaintiff may take its own time to issue the letter of demand. In my opinion if a party is to assert its right it must do so at the first available opportunity and take action promptly.

[42] On the foregoing reasons, this appeal is allowed. The decision of the learned magistrate below is set aside. The answer to the first question is in the negative and the answer to the second question, para. (a), is also in the negative. Accordingly therefore para. (b) to the second question need not be answered because the defendant has conceded under para. (c) of the same question that if the answer to the first question and para. (a) of the second question is in favour of the plaintiff, which is the case here, the plaintiff may enter judgment against the 3rd defendant. Consequently, there shall be judgment for the plaintiff against the 3rd defendant. So ordered. Costs allowed to plaintiff.